SUPPLEMENTAL APPENDIX

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
BOARD OF LAND APPEALS

EDWARD H. KOCH, et al.,	IBLA Docket No. 89-1
Appellants	Hearing on Protest
v.	Survey of Islands in Colorado River
BUREAU OF LAND MANAGEMENT	
Respondent	

STIPULATION

I. EXHIBITS WHICH MAY BE OFFERED

The parties may offer any exhibit which is believed to be relevant or material to the issues of this case, subject to the objections of materiality, relevancy or reliability.

II. EXHIBITS WHICH SHALL BE ADMITTED

A. Copies of original field notes relating to the surveys of the following Townships and related plats:

1. T. 5 S., R. 90 and 91 W. of the 6th P.M.; (Willamson)
2. T. 6 S., R. 91 W. of the 6th P.M.; (Clark)
3. T. 6 S., R. 92 W. of the 6th P.M.; (Clark)
4. T. 6 S., R. 93 W. of the 6th P.M.; (Clark)
5. T. 6 S., R. 94 W. of the 6th P.M.; (Churchfield)
6. T. 6 S., R. 95 W. of the 6th P.M.; (Churchfield)
7. T. 7 S., R. 95 W. of the 6th P.M.; (Churchfield)
8. T. 7 S., R. 96 W. of the 6th P.M.; (Churchfield)
9. T. 8 S., R. 96 W. of the 6th P.M.; (House)
10. T. 8 S., R. 97 W. of the 6th P.M.; (Simons)

B. Copies of original Government Patents to lands adjoining the Colorado River in the involved reach, described as follows:

1. Section 25, T. 6 S., R. 95 W. of the 6th P.M.

   Patent Nos.:
   1. 12
   2. 995
   3. 1029

2. Section 35, T. 6 S., R. 95 W. of the 6th P.M.

Patent Nos.:
1. 1041
2. 1195
3. 12
4. 1194

3. Section 7, T. 7 S., R. 95 W. of the 6th P.M.

Patent Nos.:
1. 915
2. 902
3. 715
4. 842979
5. 699

4. Section 7, T. 7 S., R. 95 W. of the 6th P.M.

Patent Nos.:
1. 699
2. 915
3. 715
4. 842979
5. 902

5. Sections 6 and 7, T. 8 S., R. 96 W. of the 6th P.M.

Patent Nos.:
1. 968730
2. 1351

3. 14
4. 6
5. 1127

6. Section 7, T. 8 S., R. 96 W. of the 6th P.M.

Patent Nos.:
1. 968730
2. 1351
3. 14
4. 1127

III. FACTS STIPULATED

The Parties stipulate and agree to the following facts which are deemed admitted and which will require no proof at trial:

A. OWNERSHIP OF LANDS ADJACENT TO DISPUTED AREAS

(1) Walter B. Lemon and Roberta A. Lemon hold title to lands along the south bank of the Colorado River in Section 25, T. 6 S., R. 95 W. of the 6th P.M. through mesne conveyance from the original patents granted by the United States, which describe the patented acreage by reference to the official plats of the original survey of the involved lands. These lands are adjacent to the lands claimed by the Government as Tract 37 in that section.

(2) Flora Dere holds title to lands along the north bank of the Colorado River in Section 35, T. 6 S., R. 95 W. of the 6th P.M. through mesne conveyance from the original patents granted by the United States, which describe the patented acreage by reference to the official plats of the original survey of the involved lands. These lands are adjacent to the lands claimed by the Government as Tract 39 in that section.

(3) Edward H. Koch holds title to lands along the north bank of the Colorado River in Section 7, T. 7 S., R. 95 W. of the 6th P.M. through mesne conveyance from the original patents granted by the United States, which describe the patented acreage by reference to the official plats of the original survey of the involved lands. These lands are adjacent to the lands claimed by the Government as Tract 37 in that section.

(4) Richard E. Looney and Daisey B. Looney hold title to, and Jan Ertl, by virtue of a contract of purchase and sale, asserts an interest in, lands along the north bank of the Colorado River in Section 7, T. 7 S., R. 95 W. of the 6th P.M., through mesne conveyance from the original patents granted by the United States, which describe the patented acreage by reference to the official plats of the original survey of the involved lands. These lands are adjacent to the lands claimed by the Government as Tract 37 in that section.

(5) Edward N. Juhan and Anthony Zarlengo hold title to lands along the south bank of the Colorado River in Section 7, T.8 S., R. 96 W. of the 6th

P.M. through mesne conveyance from the original patents granted by the United States, which describe the patented acreage by reference to the official plats of the original survey of the involved lands. These lands are adjacent to the lands claimed by the Government as Tracts 38, 39 and 41 in that section.

(6) Exxon Corporation ("Exxon") holds title along the banks of the Colorado River in T. 8 S., R. 96 W., 6th P.M. through mesne conveyance from the original patents granted by the United States, which describe the patented acreage by reference to the official plats of the original survey of the involved lands. These lands are adjacent to the lands claimed by the Government as Tracts 39 and 40 in that section.

(7) The patents to the lands adjoining the Colorado River in the involved reaches contained no reservations of the disputed lands to the United States.

(8) The patents to the lands adjoining the Colorado River in the involved reach incorporate by reference the Government Land Office plats and field notes of the areas surveyed.

B. LAND SURVEYS

1. The original surveys of the lands which are the subject of these proceedings were conducted pursuant to contracts which required the individual surveyors to post a bond for at least double the estimated amount that was to have been due him upon the completion of the contract.

Upon the individual surveyor's certification of completion of his survey, his field notes were examined and approved by the United States Surveyor General and a plat thereof was prepared by the Department of the Interior and certified by the United States Surveyor General to be strictly conformable to the field notes of the individual surveys. No surveys were approved until they were found to have been in exact accordance with the Instructions governing them.

2. Deputy Surveyor Williamson surveyed two townships along the Colorado River, T. 5 S., Rgs. 90 and 91 W. of the 6th P.M. in October, November and December of 1883 and January of 1884. These surveys were governed by the 1855 Manual, the Special Instructions dated December 11, 1883 and October 10, 1883, respectively. Only small portions of the River were involved but the area surveyed does include what is now the Town of New Castle, Colorado. The sections along the River are not fractionally lotted, nor is the River meandered. The surveys of said townships were accepted, respectively, on February 13, 1884 and December 13, 1883 as being in exact accordance with the applicable instructions.

3. Township 8 South, Range 97 West was surveyed by U.S. Deputy Surveyor Henry E. Simon during the period March-April, 1885. This survey was governed by the 1855 Manual, the 1864 Instructions, the 1881 Instructions, the 1884 Annual Instructions and Special Instructions dated December 17, 1884. The plat of Township 8 South, Range 97 West reflects the existence of four "islands"; however, U.S. Deputy Surveyor Simons meandered only the right bank of the River without

mentioning the existence of any such islands in his field notes and no fractional subdivisions were surveyed in sections adjacent to the River with the result that entire legal subdivisions were patented by the United States without reference to the meandered bank of the River, any islands, or the River itself.

The Simons survey was examined in the field, reported as having been correctly surveyed, and accepted by the Commissioner of the General Land Office as having been conducted in exact accordance with the applicable instructions on March 2, 1887.

4. Township 6 South, Range 91 West, Township 6 South, Range 92 West and Township 6 South, Range 93 West were surveyed by U.S. Deputy Surveyor Benjamin F. Clark in October-November, 1886, and October, 1887. These surveys were governed by the 1885 Manual, the 1864 Instuctions, the 1881 Instructions, the 1884 Instructions, Special Instructions dated June 29, 1886 and Supplemental Special Instructions dated June 8, 1887.

U.S. Deputy Surveyor Clark's June 29, 1886 Special Instructions directed him to meander the right bank only of the River. By Supplementary Instructions dated June 8, 1887, U.S. Deputy Surveyor Clark was directed to meander the left bank of the River and he was similarly instructed to meander all islands in the River. U.S. Deputy Surveyor Clark meandered five islands and noted the existence of approximately eleven topographical objects lying between the meander lines of the River.

Upon final examination and approval, the Clark surveys were accepted on January 5, 1888 as being in exact accordance with his instructions.

5. Township 6 South, Range 94 West, Townships 6 and 7 South, Range 95 West and Township 7 South, Range 96 West, Sixth P.M. were surveyed by United States Deputy Surveyor Peter Churchfield during the period October-November, 1889. The Churchfield surveys were governed by the 1855 Manual, the 1864 Instructions, the 1881 Instructions, the 1884 Annual Instructions and Special Instructions dated July 22, 1889. The Churchfield survey resulted in two islands being meandered and a notation of approximately fifteen various topographical objects lying between the meander lines of the River. The Churchfield surveys were examined in the field and accepted on March 12, 1890 as being in exact accordance with the applicable instructions.

6. Township 8 South, Range 96 West was surveyed by U.S. Deputy Surveyor George W. House in June 1891. The House survey was governed by the 1890 manual and Special Instructions dated April 20, 1891. While noting the existence of four land masses between the meander lines of the River, Surveyor House did not meander any islands. The House survey was examined and approved as having been conducted in exact accordance with his instructions on February 23, 1892.

C. SURVEYING INSTRUCTIONS

The original surveys of the lands which are the subject of this protest, conducted between the period March, 1885 through June, 1891, were required to be completed in strict conformity with the laws of the United States and the following described instructions:

1. The 1855 Manual of Surveying Instructions

(a) The 1855 Manual instructed all United States Deputy Surveyors, in regard to the surveying of islands, as follows:

> 4. The precise relative position of islands, in a township made fractional by the river in which the same are situated, is to be determined trigonometrically - sighting to a flag or other fixed object on the island, from a special and carefully measured base line, connected with the surveyed lines, on or near the river bank, you are to form connexion (sic) between the meander corners on the river to points corresponding thereto, in direct line, on the bank of the island, and there establish the proper meander corners, and calculate the distance across.

(b) The 1855 Manual stated that the execution of the surveys by the Deputy Surveyors would be monitored by special examinations in order to determine contract compliance (1855 Manual, Introductory Chapter).

(c) The 1855 Manual, regarding the observation of topographical objects encountered during the course of survey, instructed as follows:

> The FIELD NOTES afford the elements from which the plats and calculations in relation to the public surveys are made. . . [T]hey therefore must be a faithful, distinct and minute record of everything officially done and observed by the surveyor and his assistants, pursuant to instructions, in relation to running, measuring, and marking lines, establishing boundary corners, & c.; present, as far as possible, a full and complete topographical description of the country surveyed, as to every matter of useful information, or likely to gratify public curiosity (emphasis in original). (1855 Manual, at 15.)

2. The June 1, 1864 Instructions

(a) The Instructions to the Surveyors General of Public Lands of the United States, dated June 1, 1864 (the 1864 Instructions), were similarly deemed a part of every contract for surveying the public

lands of the United States (1864 Instructions, at 3) and they supplemented the 1855 Manual.

(b) The 1864 Instructions, as they related to the survey of small islands, directed the Deputy Surveyors as follows:

> Many applications are received at this office for the purchase of small unsurveyed islands which were omitted when the adjacent lands were surveyed. These islands are usually of too little value to justify the Government in incurring the expense of survey; but where a party desires a survey made and is willing to pay the cost thereof in advance, upon the conditions set forth in these Instructions, it may be done under the provisions of the 10th section of the Act of May 30, 1862 . . .
>
> It will be understood that these Instructions relate only to isolated islands or islands that were omitted when the public surveys were extended over the adjacent lands, and do not apply to islands falling within the regular course of current surveys, which must be included in the contracts for surveying the public land.
>
> As a general rule, a body of land separated from the mainland by a perpetual natural channel may be regarded as an island for the

purposes contemplated in these instructions. (1864 Instructions, at pp. 6-7.)

3. The May 3, 1881 Instructions

(a) The May 3, 1881 Manual of Survey Instruction (the 1881 Instructions) likewise supplemented the 1855 Manual and the 1864 Instructions.

(b) With regard to islands, the 1881 Instructions stated as follows:

> SEC. 3 . . . [A]ll islands, rapids, and bars are to be noticed, with intersections to their upper and lower points to establish their exact situation. . ..
>
> 5. The precise relative position of islands, in a township made fractional by the river in which the same are situated, is to be determined trigonometrically; sighting to a flag or other fixed object on the island, from a special and carefully measured base line, connected with the survey lines, on or near the river bank, you are to form connection between the meander corners on the river to points corresponding thereto, and direct line, on the bank of the island, and there establish the proper meander corners, and calculate the distance across.

> 6. In taking the connection of an island with the mainland, when there is no meander corner in line, opposite thereto, to site from, you will measure a special base from the meander corner nearest to such island, and from such base you will triangulate to some fixed point on the shore of the island, ascertain the distance across, and there establish a special meander corner, wherefrom you will commence to meander the island. (1881 Instructions, at pp. 34-35.)

(c) As to the directions given deputy surveyors with regard to the notation of various objects of topography encountered during the course of the survey, the 1881 Instructions stated as follows:

> The utmost care must be taken to pass no object of topography, or change therein, without giving a particular description. The deputy surveyor . . . must make a faithful, distinct and minute record of everything officially done and observed by himself and his assistants, pursuant to instructions, in relation to running, measuring and marking lines, establishing corners, etc., and present as far as possible, a full and complete topographical description of the country surveyed. (1881 Instructions, at 35).

(d) With regard to topographical objects, the 1881 Instructions state:

> With the instructions for making subdivisional surveys of townships into sections, the deputy will be furnished by the Surveyor General with a diagram of the exterior lines previously established of the townships to be subdivided . . . [a]nd on such diagram the deputy who subdivides will make appropriate sketches of the various objects of topography as they occur on his lines, so as to exhibit not only the points on line at which the same occur, but also the direction and position of each between the lines, or within each section, as far as practicable, so that every object of topography may be properly completed or connected in the showing. (1881 Instructions, at pp. 42-43.)

4. The July 25, 1884 Instructions

(a) The July 25, 1884 Annual Instructions (the 1884 Instructions) further supplemented the 1855 Manual and supplementary instructions and, as such, were deemed a part of every contract for surveying the public lands of the United States. (Act of May 30, 1862, 12 Stat. 409.)

5. The January 1, 1890 Manual

(a) The January 1, 1890 Manual of Survey Instruction (the 1890 Manual) superceded the 1855 Manual and the Instructions referenced above. Along with subsequent surveying instructions issued by the commissioner

of the General Land Office and such special instructions as were issued by the Surveyor General, they constituted a part of every contract for surveying the public lands of the United States.

(b) As to the treatment to be given islands encountered during the course of the survey, deputy surveyors were instructed under the 1890 Manual as follows:

> 5. The precise relative position of islands, in a township made fractional by the river in which the same are situated, is to be determined trigonometrically; siting to a flag or other fixed object on the island, from a special and carefully measured base line, connected with the survey lines, on or near the river bank, you are to form connection between the meandered corners on the river to points corresponding thereto, in direct line, on the bank of the island, and there establish the proper meander corners, and calculate the distance across.
>
> 6. In taking the connection of an island with the mainland, when there is no meander corner in line, opposite thereto, to site from, you will measure a special base from the most convenient meander corner, and from such base you will triangulate to some fixed point on the shore of the island, ascertain the distance across, and there establish a special meander corner, wherefrom you will

> commence to meander the island (Emphasis in original). (1890 Manual, at 35.)

(c) As to the treatment to be given various topographical objects encountered during the course of the survey, the deputy surveyors were instructed as follows:

> The utmost care must be taken to pass no object of topography, or change therein. without giving a particular description thereof in its proper place in your meander notes. (1890 Manual, at 35.)

(d) Further instructions regarding the notation of topographical objects were stated as follows:

> . . . [T]he deputy surveyor must make a faithful, distinct, and minute record of everything officially done and observed by himself and his assistants, pursuant to instructions, in relation to running, measuring, and marking lines, establishing corners, etc., and present, as far as possible, a full and complete topographical description of the country surveyed. (1890 Manual, at 41.)

> . . . [T]he deputy who subdivides will make appropriate sketches of the various objects of topography as they occur on his lines, so as to exhibit not only the points on line at which

> the same occur, but also the direction and position of each between the lines, or within each section, as far as practicable, so that every object of topography may be properly completed or connected in the showing. (1890 Manual, at 43.)

D. THE FIELD NOTE NOTATIONS MADE BY THE SURVEYORS IN ACCORDANCE WITH THEIR INSTRUCTIONS

1. Surveyor Clark Notations. As noted above Deputy Surveyor Clark mendered 6 islands and noted some 11 topographical objects. His references to the latter were variously "bar", "low water island," "Bar in River," "Rocky bar," and "Rock bar," "very wide deposit of boulders and sand," "two narrow parallel sand bars," and "E. end of long island." None of the topographical objects so described are claimed by the Government.

2. Surveyor Churchfield Notations. Immediately downstream of the Clark surveys Deputy Surveyor Churchfield completed the meandering of an island commenced by Deputy Survyor [sic] Clark in Sec. 13, T. 6 S. , R. 94 W. and meandered by triangulation one island in Sec. 13, T. 7 S., R. 96 W. Specific reference is made to the Churchfield field notes and as to what the Government claims, as follows:

(a) In Section 25, Township 6 South, Range 95 West, the BLM investigated as Tract 37 a land

mass originally identified as a "bar or low island" in the Churchfield field notes and has claimed this as public land.

(b) In Section 36, Township 6 South, Range 95 West, the BLM investigated as Tract 38 a land mass originally referred to as a "low island" in the Churchfield surveys and has claimed this as public land.

(c) In Section 36, Township 6 South, Range 95 West the BLM has investigated and claimed a land mass originally identified in the Churchfield field notes as a "small bar or island." This is also designated as Tract 38.

(d) In Section 35, Township 6 South, Range 95 West, the BLM has investigated as Tract 39 and claimed a land mass originally described in the Churchfield field notes as a "long low island, overflowing and unfit for cultivation."

(e) In Section 7, Township 7 South, Range 95 West, the BLM has investigated as Tract 37 and claimed as public land certain lands originally described in the Churchfield field notes as "low overflowing island" . . . "bar or low island."

3. Surveyor House Notations. The specific references in field notes of Deputy Surveyor House of his survey of T. 8 S., R. 96 W. and as to what the Government claims are as follows:

(a) In Sections 4 and 5, Township 8 South, Range 96 West, the BLM has investigated as Tract 37 and

claimed as public lands the land mass referred to as a "gravel bar" in the original House survey notes.

(b) In Section 7, Township 8 South, Range 96 West, the BLM has investigated as Tract 39 and claimed as public lands a land mass referred to in the original House field notes as a "large island" which was not meandered.

(c) In Section 7, Township 8 South, Range 96 West, the BLM has investigated as Tract 38 and claimed as public land a land mass referred to as a "small island" in the original House field notes.

(d) In Section 7, Township 8 South, Range 96 West, the BLM has investigated as Tracts 40 and 41 and claimed as public land two land masses referred to in the original House field notes as "island" and "gravel bar," respectively.

4. Surveyors Williamson and Simons Notations. Surveyors Williamson and Simons did not note the existence of any islands or topographical objects in the field notes of their surveys.

5. The surveys of the involved lands were accepted as having been completed in exact conformance with the Instructions.

6. The involved reach of the Colorado River is non-navigable.

7. The original surveys were neither fraudulent nor erroneous.

8. It is agreed that documents in the administrative record numbers 66-68, 70-72, 75, 76, 93, 94, 110, 111, 123, 132, 141, 141A, 198, 198B, 200, 266, 271, 273, 274, 280, 281 and 292A are authentic and may be admitted into evidence subject to objection as to relevancy and materiality.

IV. FACTS CLAIMED ON WHICH APPELLANTS SHALL PUT ON THEIR PROOF

1. That the disputed lands were below the ordinary high water mark of the Colorado River at the time of the original surveys and were thus part of the riverbed which will be established by exhibits prepared by Mr. William Lorah.

V. FACTS CLAIMED ON WHICH THE GOVERNMENT SHALL PUT ON ITS PROOF

1. That the disputed lands were islands at the time of the original survey.

VI. LEGAL ISSUES AGREED TO

1. A Grantee of land bordering a non-navigable meandered river takes title to all submerged lands between the mainland and the thread of the river, unless expressly reserved by the United States.

2. In the absence of an express reservation of submerged unsurveyed lands, such a reservation cannot be implied.

3. The original Government Land Office plats and field notes of the areas surveyed, having been incorporated by reference in the original patents, are a part of the description of the lands granted.

4. A meander line is a traverse of the margin of a permanent natural body of water which follows the contour of such a body at mean high water. Meander lines are not run as boundaries, but are used to define the sinuosities of the river and to ascertain the quantity of land remaining after segregation of the water area.

5. An "Island" is a permanent land mass rising from the bed of a meanderable body of water above the mean high water mark, separated from the mainland by a perpetual channel.

VII. LEGAL ISSUES TO BE DETERMINED

1. Whether at the time of the original surveys of the disputed lands there was in effect an official or unofficial policy of the Government not to survey islands falling within the regular course of the surveys of the public lands.

VIII. NAMES AND ADDRESSES OF WITNESSES

Appellants' Witnesses:

1. William Lorah
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   818 Colorado Avenue
   Glenwood Springs, CO 81601
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2. James Lemon
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Government's Witnesses:

3. Jack Eaves
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   Colorado State Office
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   Lakewood, CO 80215

4. Lyn Livermore
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5. Donald Ashbaugh
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RESPECTFULLY SUBMITTED this 12th day of June, 1989.

DELANEY & BALCOMB, P.C.

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OFFICE OF THE REGIONAL SOLICITOR

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